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CITATIONS

568-360—75——1

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-450

ALEXANDER P. BUTTERFIELD, ADMINISTRATOR OF THE FEDERAL AVIATION ADMINISTRATION, ET AL., PETITIONERS

v.

REUBEN B. ROBERTSON, III AND JEROME B. SIMANDLE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1A–16A) is reported at 498 F.2d 1031. The order of the district court (Pet. App. C, pp. 19A–20A) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, pp. 17A–18A) was entered on May 9, 1974. A timely petition for rehearing was denied on July 11, 1974 (Pet. App. D, p. 21A). On October 4, 1974, the Chief Justice extended the time to petition for a writ

of certiorari to October 19, 1974. The petition was filed on October 18, 1974, and was granted on December 16, 1974. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Exemption 3 of the Freedom of Information Act provides for nondisclosure of "matters that are specifically exempted from disclosure by statute." The question is whether this exemption covers all material with respect to which Congress by statute has provided for nondisclosure upon various terms, including statutes that give government officials discretion to decide whether to disclose.

STATUTES INVOLVED

The Freedom of Information Act, as amended, 5 U.S.C. 552, provides in pertinent part:

> Section 552. *Public information; agency rules, opinions, orders, records, and proceedings.*
>
> (a) Each agency shall make available to the public information as follows:
>
> * * * * *
>
> (3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed,

shall make the records promptly available to any person.[1]

* * * * *

(b) This section does not apply to matters that are—

* * * * *

(3) specifically exempted from disclosure by statute;

* * * * *

Section 1104 of the Federal Aviation Act of 1958, 72 Stat. 797, 49 U.S.C. 1504, provides:

> Any person may make written objection to the public disclosure of information contained in any application, report, or document filed pursuant to the provisions of this chapter or of information obtained by the Board or the Administrator, pursuant to the provisions of this chapter, stating the grounds for such objection. Whenever such objection is made, the Board or Administrator shall order such information withheld from public disclosure when, in their judgment, a disclosure of such information

[1] This section was amended by the 1974 Amendments to the FOI Act, Pub. Law 93–502, 88 Stat. 1561. Prior to the amendments, Section 552(a)(3) read, in pertinent part:

"Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. * * *"

The amendments did not affect exemption 3 of the Act, 5 U.S.C. 552(b)(3).

would adversely affect the interests of such person and is not required in the interest of the public. The Board or Administrator shall be responsible for classified information in accordance with appropriate law: *Provided,* That nothing in this section shall authorize the withholding of information by the Board or Administrator from the duly authorized committees of the Congress.

STATEMENT

1. In this suit the respondents seek, under the Freedom of Information Act (FOI Act), 5 U.S.C. 552, reports prepared by the Federal Aviation Administration (FAA) in connection with its Systemsworthiness Analysis Program (SWAP). This program, which supplements the FAA's ordinary surveillance of airlines, consists of in-depth studies by FAA investigative teams of broad areas of airlines' operations and is intended to prevent unsafe conditions from arising.[2]

[2] The FAA instituted the program on July 1, 1966 with the inspection of air carriers and on October 1, 1969, the program was expanded to cover the general aviation industry (A. 41). The current FAA SWAP handbook defines the program as follows (FAA Order 8000.3C, ¶ 1; A. 127, 218):

"The Flight Standards Systemsworthiness Analysis Program is a systems approach to fulfill agency responsibilities for inspection and surveillance of operators having formalized systems that cannot be monitored effectively using customary surveillance techniques. It is aimed at determining the causal factors which allow a system to deteriorate rather than the symptoms that are a result of such deterioration. The task of the SWAP team is to supplement the process of surveillance with an indepth analysis of operators' systems and subsystems to determine if system objectives are being achieved."

As the affidavit of the former Federal Aviation Administrator in this case stated, the "investigative team works in close cooperation with airline management to find any area of maintenance, operations, management, or overall performance which needs improvement" and, thus, "[t]he system depends upon the frank and full disclosure of the airline" (A. 40).[3]

A SWAP investigation results in a report for the use of FAA officials, setting out the team's findings, discussions and recommendations concerning the systems inspected (A. 135–140).[4] "Information investigated and discussed in a SWAP inspection," according to the former Administrator, "includes financial and operational matters which would not customarily be released to the public," as well as material "which would not be disclosed to competitors" (A. 40). The SWAP program, therefore, "operates with the understanding between the airlines and the FAA that the information will not be disclosed to the public" (A. 41).

Following the SWAP inspection, the SWAP team and other FAA officials meet with the operator to dis-

[3] The SWAP handbook states (FAA Order 8000.3C, ¶ 105; A. 133, 254):

"In cases where a problem area is suspected to exist, it should be frankly discussed with the operator. This straight-forward approach will help to foster a feeling of mutual trust and respect that is beneficial, if not essential, to the analysis. * * * The operator should be invited to stipulate any special areas that he would like the team to examine."

[4] Change 3 to FAA Order 8000.3C, dated July 24, 1974, amended the instructions for the preparation of SWAP reports (A. 226–250). The change, however, related principally to the use of a form for the first and last pages, and the instructions concerning the contents of the report were not substantially modified by the change (see A. 233–239, 249).

cuss the team's findings.[5] FAA Order 8000.3C, ¶ 107 (A. 135, 255). In order that the operator may intelligently discuss the team's findings at the post-inspection meeting, the findings and discussion portion of the SWAP report may be furnished to the operator (A. 42). The FAA does not make information from the reports available to the Air Transport Association or to any operator other than the one being inspected (A. 42).

2. In August, 1970, respondents requested the FAA to produce the SWAP reports for the year 1969, and when the request was denied, the respondents, on August 26, 1970, sought reconsideration of the denial (A. 6).[6] Thereafter, the Air Transport Association, on behalf of 28 airlines, requested the FAA (A. 112–114) to withhold the reports from disclosure pursuant to Section 1104 of the Federal Aviation Act, 49 U.S.C. 1504. Section 1104 (*supra*, pp. 3–4) provides that the Federal Aviation Administrator or the Civil Aeronautics Board, upon written objection to the disclosure of information obtained pursuant to the Act, may withhold such information "when, in their judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public."

In objecting to disclosure of the SWAP reports, the Air Transport Association stated that "[i]nfor-

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[5] The SWAP report is provided to the FAA district office chief and/or the principal inspectors who have responsibility for determining what corrective action is to be taken. FAA Order 8000.3C, ¶ 50 (A. 186, 219).

[6] Although the respondents initially requested that the FAA produce only the SWAP reports for 1969, this suit seeks the disclosure of all SWAP reports (A. 15, 29).

mation freely given to the FAA SWAP team by the air carrier management personnel is not specifically required by the [Federal Aviation Regulations]" and that "[t]he present practice of non-public submissions * * * encourages a spirit of openness on the part of airline management which is vital to the promotion of aviation safety" (A. 112). The Association concluded that "[i]f public disclosure of the SWAP reports were made, the interests of aviation safety would be in danger of being subordinated in some degree to legal considerations in the presentation of information to the FAA" (A. 112).

The Administrator decided to withhold the SWAP reports from public disclosure because the "disclosure of the information contained therein would adversely affect the interests of the airline being investigated and is not required in the interest of the public" (A. 115).

The FAA advised respondents of the Administrator's determination under Section 1104, explaining that the SWAP reports were therefore "matters that are specifically exempted from disclosure by statute" under exemption 3 of the FOI Act, 5 U.S.C. 552(b)(3) (A. 29). The FAA further stated that the reports were exempted from disclosure under exemptions 4, 5 and 7 of the Act, 5 U.S.C. 552(b)(4), (5) and (7) (A. 29–33).

The respondents then filed their complaint in the district court, seeking in count one the disclosure of all SWAP reports (A. 4–17).[1] The FAA responded

[1] The complaint contained seven counts. Counts two through six alleged improper administrative action or procedures. Count seven alleged a violation of the anti-trust laws and joined the

that the SWAP reports were exempted from disclosure under exemption 3 of the FOI Act by virtue of Section 1104.[8] The district court held, however, that the SWAP reports were "public and non-exempt" (Pet. App. C, p. 20A).[9]

On appeal, the court of appeals, in a 2–1 decision, held that the SWAP reports were not exempt pursuant to exemption 3 and remanded the case for consideration of other exemptions the FAA may wish to assert (Pet. App. A, pp. 1A–16A). The court stated that "[t]he ordinary meaning of the language of Exemption (3) is that the statute therein referred to must itself specify the documents or categories of documents it authorizes to be withheld from public scrutiny," and that "Section 1104 of the Aviation Act fails to do this" (Pet. App. A, p. 4A). The court concluded that since the SWAP reports "did not fall within any congressionally specified statutory category * * * [i]t would be unacceptable to hold that

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Air Transport Association as a defendant. The Air Transport Association's motion to dismiss count seven was granted, as was the federal defendants' motion to dismiss counts two through six (Pet. App. C, p. 20A; A.2). The respondents did not appeal those rulings.

[8] The FAA also relied upon exemptions 4, 5 and 7 of the FOI Act, 5 U.S.C. 552(b)(4), (5) and (7) (A. 38).

[9] Respondents also sought disclosure of Mechanical Reliability Reports (MRRs). MRRs are daily reports of mechanical malfunctions which are submitted to the FAA by aircraft operators. While he had previously declined to disclose MRRs, on January 11, 1972, the Administrator directed disclosure of MRRs received after February 18, 1972. The district court's subsequent order in this case, on November 8, 1972, ordered disclosure of MRRs received prior to February 18, 1972. Petitioners did not contest this aspect of the district court's order on appeal.

[the Administrator's] conclusion that disclosure of any and all of the reports requested would adversely affect the interests of each airline covered, and is not required 'in the interest of the public,' is a specific exemption by section 1104" (Pet. App. A, pp. 4A–5A; footnote omitted).

The court, noting that Section 1104 of the Federal Aviation Act contains a "public interest" standard, stated that the subsequently enacted FOI Act provided "the guide to the congressional intent with respect to the public interest" (Pet. App. A, p. 11A). Because the FOI Act intended to eliminate from the Public Information Section of the Administrative Procedure Act such guidelines as "in the public interest," the court concluded that "the public interest standard of section 1104 is not a specific exemption by statute within the meaning of Exemption (3)" (Pet. App. A, pp. 9A, 11A–12A).

Judge Robb dissented. He cited legislative history explaining that exemption 3 was designed to assure that the numerous previously enacted nondisclosure statutes would not be modified by the Freedom of Information Act. He concluded that "Section 1104 is tailored to the needs and problems of the Federal Aviation Administration" and was not "overridden or repealed by the general terms of the Freedom of Information Act" (Pet. App. A, p. 16A).

SUMMARY OF ARGUMENT

1. When the Freedom of Information Act was passed, there were nearly 100 statutes in effect which provided for confidential treatment of government information. In exemption 3 Congress intended to con-

tinue the effectiveness of those provisions. That exemption, which exempts from disclosure "matters that are specifically exempted from disclosure by statute," covers all statutes that specifically require or permit nondisclosure of government information, without regard to the circumstances in which such nondisclosure is provided.

Contrary to the ruling of the court of appeals, the application of exemption 3 is not limited to statutes that specify the documents which are to be kept confidential. This Court's decision in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, concerning exemption 1, which is structured similarly to exemption 3, shows that exemption 3 is not limited to nondisclosure statutes which specify the documents to be withheld. In *Mink*, this Court rejected an argument that exemption 1, which protected matters "specifically required by Executive order to be kept secret," is applicable only where an executive order specified the documents to be withheld.

2. The legislative history of exemption 3 confirms that the exemption covers all statutes that require or authorize nondisclosure, whether or not they specify the particular documents to be kept confidential. The 1966 House Report stated that there are "nearly 100 statutes or parts of statutes which restrict public access to specific Government records" and that "[t]hese would not be modified" by the FOI Act. H. Rep. No. 1497, 89th Cong., 2d Sess., p. 10. Similar statements in the legislative history of preceding bills

show that exemption 3 was intended to cover all nondisclosure statutes, including those that make confidential treatment of information discretionary with government officials. Thus the only inquiry a court is to make in applying exemption 3 is whether there is a specific statute requiring or authorizing nondisclosure.

3. Section 1104 of the Federal Aviation Act is a statute which "specifically exempts[s]" from disclosure matters that it covers. It permits the Civil Aeronautics Board or the Federal Aviation Administrator to withhold material from disclosure if its production would adversely affect the interests of the person seeking confidential treatment and "is not required in the interest of the public." 49 U.S.C. 1504. One strong indication that Section 1104 was among the nondisclosure statutes Congress intended to preserve in enacting exemption 3 is the fact that it was specifically mentioned in a list of nondisclosure statutes submitted to Congress during the 1958 hearings on Freedom of Information bills.

The holding of the court of appeals that Section 1104 is outside the scope of exemption 3 would thus nullify a large number of statutes which Congress intended to preserve and would thus defeat the congressional policy underlying exemption 3. Moreover, the nullification of Section 1104 would impair the Federal Aviation Administration's ability properly to perform its investigative functions.

ARGUMENT

THE SWAP REPORTS ARE EXEMPT FROM DISCLOSURE UNDER EXEMPTION 3 OF THE FREEDOM OF INFORMATION ACT SINCE THEY ARE MATTERS THAT ARE "SPECIFICALLY EXEMPTED FROM DISCLOSURE BY STATUTE"

When the FOI Act was enacted, there existed numerous statutes that restricted disclosure of government information in various ways. Those statutes, most of which have not been expressly repealed, provide for either mandatory [10] or discretionary nondisclosure of information. Note, *Freedom of Information: The Statute and the Regulations,* 56 Geo. L. J. 18, 33–34 (1967).

The discretionary statutes differ widely. They range from those, like 42 U.S.C. 1306,[11] which provide for the nondisclosure of information unless government officials authorize disclosure, to those, like Section 1104, which permit disclosure unless government officials determine that the material should be kept confidential. They also vary with respect to the specificity of both the description of the material to be kept confidential and the basis upon which government

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[10] An example of a mandatory nondisclosure statute is 22 U.S.C. 987, which provides that correspondence and records of the State Department relating to the officers and employees of the Foreign Service are confidential and subject to inspection only by certain specified government officers.

[11] 42 U.S.C. 1306(a) provides in pertinent part:

"No disclosure of any * * * report * * * obtained at any time by the Secretary of Health, Education and Welfare * * * or by any officer or employee of the Department * * * in the course of discharging their respective duties under this chapter * * * shall be made except as the Secretary * * * may by regulations prescribe."

officials may disclose it.[12] By exemption 3, Congress intended to continue the effectiveness of all existing nondisclosure provisions.

A. EXEMPTION 3 COVERS ALL STATUTES THAT REQUIRE OR PERMIT NONDISCLOSURE OF GOVERNMENT INFORMATION

Exemption 3 of the FOI Act (5 U.S.C. 552(b)(3)) exempts from compelled public disclosure "matters that are specifically exempted from disclosure by statute." By its terms, the exemption extends to all cases where a right to withhold from disclosure is created by statute, in contrast to cases where it is merely implied from legislation or asserted without specific statutory authority on the basis of a judgment that disclosure would not be appropriate. As the Court of Appeals for the Ninth Circuit said in *People of California* v. *Weinberger,* 505 F. 2d 767, 768 (Reply Memo, App., p. 6): "It appears to us that when Congress used the word 'specifically' it was requiring no more than that the exemption be found in the words of the statute rather than the implication of it."[13]

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[12] For example, 35 U.S.C. 122 provides that information in patent applications cannot be made public by the Patent Office "unless necessary to carry out the provisions of any Act of Congress or in such special circumstances as may be determined by the Commissioner."

38 U.S.C. 3301 states that all files, records, and other papers pertaining to any claim under any law administered by the Veterans' Administration are not to be disclosed except that "[t]he Administrator may release information * * * when in his judgment such release would serve a useful purpose."

[13] Commentaries on exemption 3 have expressed the view that discretionary nondisclosure statutes are within its coverage. *Developments Under the Freedom of Information Act—1972,* 1973 Duke L. J. 157, 192–194; Note, *supra,* 56 Geo. L. J. at 33–34.

The language of exemption 3 does not limit the exemption to statutes which make nondisclosure mandatory, and does not exclude statutes which authorize the government to exercise discretion in the disclosure of information.[14] Contrary to the view of the court of appeals (Pet. App. A, p. 4A), nothing in the wording of exemption 3 indicates or suggests that the statute which "specifically exempt[s]" matters from disclosure must specify the particular documents or categories of documents to be withheld.

The conclusion of the court of appeals that exemption 3 covers only nondisclosure statutes that themselves specify the documents to be withheld is inconsistent with this Court's interpretation of another similarly structured exemption to the Act in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73. That case involved exemption 1, which exempts from disclosure matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." 5 U.S.C. 552(b)(1). The Executive Order involved in *Mink*, No. 10501, did not refer, "specifically" or otherwise, to the six documents at issue in that case. Rather, that Executive Order, like Section 1104, merely delegated to executive officials the authority to determine which documents were to be withheld from public scrutiny. Executive Order 10501, 3 C.F.R. (Jan. 1, 1970 rev.) 280.

[14] Nondisclosure of information based upon a discretionary statute is, of course, based upon congressional authority, just as is the withholding of information pursuant to a mandatory nondisclosure statute. *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 82, n. 8.

This Court rejected the argument that "classification of material under Executive Order 10501 is somehow insufficient for Exemption 1 purposes, or that the exemption contemplates the issuance of orders, under some other authority, for each document the Executive may want protected from disclosure under the Act" (410 U.S. at 83). Similarly, there is nothing in exemption 3 that limits its coverage to statutes that "specify the documents or categories of documents it authorizes to be withheld from public scrutiny" (Pet. App. A, p. 4A).[15]

The court of appeals sought to distinguish *Mink* on the ground that this Court construed exemption 1 in *Mink* "to be a specific reference by Congress itself to a definite class of documents which were not to be disclosed" (Pet. App. A, p. 4A). However, as noted, exemption 1 merely refers to "matters that are specifically required by Executive Order to be kept secret" and does not refer to a "definite class of documents." By the same token, exemption 3 refers to "matters that are specifically exempted from disclosure by statute" and does not refer to a "definite class of documents."

Thus, under exemption 3 the only function of a reviewing court is to determine whether there is a specific statute requiring or authorizing the confidentiality of the material involved. This was the

[15] Mr. Justice Stewart, concurring in *Mink*, noted that exemption 3, like exemption 1, is "[s]imilarly rigid" and that "the only 'matter' to be determined in a district court's *de novo* inquiry [under exemption 3] is the factual existence of * * * a statute, regardless of how unwise, self-protective, or inadvertent the enactment might be" (410 U.S. at 95, note).

approach taken by the court of appeals for the Fifth Circuit in *Evans* v. *Department of Transportation*, 446 F. 2d 821, certiorari denied, 405 U.S. 918. That court seemingly—and correctly—viewed its role as limited to ascertaining whether there was a statute providing for confidential treatment.

In *Evans*, the Federal Aviation Administration received a letter describing Evans' alleged mental disorders affecting his qualification as a commercial pilot, but not identifying Evans by name. The correspondent refused to name Evans until he had been assured in writing that his letter would be kept confidential. 446 F.2d at 823. The court of appeals, as an alternative ground for holding that Evans could not obtain the letters under the Freedom of Information Act, ruled that exemption 3 covered the letters. Noting that exemption 3 covers "matters that are specifically exempted from disclosure by statute," it ruled that, since the identity of Evans had been given under "assurances of complete non-disclosure," Section 1104 covered the situation. The Court of Appeals for the Fifth Circuit, thus, apparently concluded that since there was a statute authorizing the nondisclosure of information, that ended the inquiry.[16]

[16] Courts of appeals which have departed from the limited inquiry whether there is a specific exemption statute have reached a variety of contradictory results.

Thus, in *Stretch* v. *Weinberger*, 495 F. 2d 639, holding that exemption 3 does not apply to documents covered by 42 U.S.C. 1306(a) (*supra*, n. 11), the Court of Appeals for the Third Circuit ruled that for a statute providing for confidentiality to be within exemption 3, it must "prescribe some basis upon which the [agency] is to decide" whether to disclose material, namely, it must prescribe "standards or guides

B. THE LEGISLATIVE HISTORY OF THE FREEDOM OF INFORMATION ACT SHOWS THAT CONGRESS INTENDED IN EXEMPTION 3 TO CONTINUE THE EFFECTIVENESS OF THE MANY STATUTES THAT THEN PROVIDED FOR CONFIDENTIAL TREATMENT

The legislative history of exemption 3 shows that Congress was aware of the numerous existing nondisclosure statutes and intended to preserve all of them, whatever their terms, which specifically provided for confidential treatment of information in the possession of the government.

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through which legislative judgment would be reflected in the making of administrative exemptions" (495 F. 2d at 640).

Schechter v. *Weinberger*, C.A.D.C., No. 73–1797, decided October 3, 1974, and *Serchuk* v. *Weinberger*, 493 F. 2d 663 (C.A. 5), which also involved 42 U.S.C. 1306(a), reached the same result. Judge MacKinnon dissented in *Schechter* on the ground that Congress was "well aware of the existence of statutes such as 1306" and that "[i]f Congress had not intended to include this statute within Exemption Three, it could easily have done so either by explicitly narrowing the coverage of the exemption or by amending Section 1306" (498 F. 2d 1015, 1016). See also 1973 Duke L. J., *supra*, at 193–194.

The Court of Appeals for the Fourth Circuit in *Sears* v. *Gottschalk*, 502 F. 2d 122, certiorari pending, No. 74–584, which involved a denial, pursuant to 35 U.S.C. 122 (*supra*, n. 12), of a request for abandoned patent applications, agreed with the interpretation of exemption 3 in *Stretch*, but concluded that the material was, nevertheless, exempted from disclosure by exemption 3.

The Court of Appeals for the Ninth Circuit in *People of California* v. *Weinberger*, 505 F. 2d 767 (Reply Memo, App., p. 4), held, contrary to *Stretch*, that material covered by 42 U.S.C. 1306(a) is exempted from disclosure by exemption 3. The court distinguished between "a statute in which the congressional words themselves prohibit disclosure," which the court believed was within exemption 3, and "a statute which authorizes an administrator to exempt from disclosure," which it concluded was outside of the exemption (Reply Memo, App., p. 7).

In explaining exemption 3, the 1966 House Report stated that there are "nearly 100 statutes or parts of statutes which restrict public access to specific Government records. These would not be modified by the public records provision of S. 1160."[17] H. Rep. No. 1497, 89th Cong., 2d Sess., p. 10.[18] This interpretation of the exemption was in accord with numerous prior expressions of congressional intent, made during the legislative consideration of the predecessor bills to the statute actually enacted, to preserve previously enacted nondisclosure statutes.[19]

Thus, during the 1963 Senate Hearings, Senator Long, the Chairman of the Senate Subcommittee, and a leading proponent of the FOI Act, stated (Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, on S. 1666 and S. 1663 (in part)[20] (Freedom of

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[17] S. 1160 is the Senate Bill which was enacted as the FOI Act.

[18] The *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* (June 1967), pp. 31–32, after noting that there are statutes "which specifically exempt from disclosure, prohibit disclosure except as authorized by law, provide for disclosure only as authorized by law, or otherwise protect from disclosure," concluded that the reference in the House Report to "nearly 100 statutes" "indicates an intention to preserve whatever protection is afforded under other statutes, *whatever their terms*" (emphasis added).

[19] The Senate Report on S. 1160 does not contain an explanation of exemption 3. S. Rep. No. 813, 89th Cong., 1st Sess.

[20] Although the structure of S. 1160 was modified from that of S. 1666, the language of exemption 3 in both bills is the same. See Note, *Comments on Proposed Amendments to Section 3 of the Administrative Procedure Act: The Freedom of Information Bill*, 40 Notre Dame Law. 417, 437–438, n. 142, 443, n. 179 (1965).

Information), 88th Cong., 1st Sess., p. 6):

> Section 3(e) of S. 1666 states that nothing in this section authorizes the withholding of information nor the limiting of public access to records except as specifically described in the measure. * * * *Statutes which curtail the availability of information to the public are not intended to be affected by the enactment of this bill.* They provide that specified records shall not be released unless authorized by law. Subsection 3(e) is not such an authorization to disclosure. It should be made clear that *this bill in no way limits statutes specifically written with the congressional intent of curtailing the flow of information* as a supplement necessary to the proper functioning of certain agencies.[21] [Emphasis added.]

The 1964 Senate Report on S. 1666 similarly stated (S. Rep. No. 1219, 88th Cong., 2d Sess., p. 12):

> Exception No. 3 relates to matter which "is specifically exempted from disclosure by statute." *This exception has been added to insure that S. 1666 is not interpreted to override specific statutory exemptions.* [Emphasis added.]

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[21] The Chief Counsel of the Subcommittee, Mr. Fensterwald, also indicated that, in his view, the proposed exemption 3 referred to a "specific *statute*" (*id.* at 91; emphasis added).

In the 1965 Hearings before the same Senate Subcommittee, various media representatives, appearing in support of the FOI bill, pointed out that exemption 3 is "less susceptible to any general misinterpretation" than other exemptions "since the withholding is under specific statutes." Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, on S. 1160, *et al.*, 89th Cong., 1st Sess., p. 535 ("1965 Senate Hearings"). An identical statement appears in the 1965 Hearings before a Subcommittee of the House Committee on Government Operations, on H.R. 5012, *et al.* (Federal Public Records Law (Part 1)), 89th Cong., 1st Sess., p. 137.

During the 1965 Hearings before the Foreign Operations and Government Information Subcommittee of the House Government Operations Committee, Congressman Moss, the Chairman of the Subcommittee and a leading proponent of the FOI Act, stated that the FOI Act would provide for the availability of information "unless it is withheld * * * by some statutory authority given by the Congress." Hearings before a Subcommittee of the House Committee on Government Operations, on H.R. 5012, *et al.* (Federal Public Records Law (Part 1)), 89th Cong., 1st Sess. p. 14 ("1965 House Hearings"). He noted that nondisclosure would be permissible under the FOI Act for matters "covered by specific statute" and that there were "some 78 statutes which confer authority for withholding of information" (*id.* at 20, 53).[22]

Congress' intent to include within exemption 3 statutes which give government officials discretion to decide whether to disclose is further shown by con-

[22] Mr. Kass, Counsel for the Subcommittee, also pointed out (*id.* at 67):

"* * * it is not the intention of the bill as drafted and as introduced by the members of the committee and others to repeal any existing statute which authorizes the [Treasury] Department to withhold information such as income tax returns."

Mr. Smith, Acting General Counsel of the Treasury Department, concerned with the effect upon 18 U.S.C. 1905, noted that this intention appeared inconsistent with Section 2 of the bill before the Subcommittee, which provided that: "All laws or parts of laws inconsistent with the amendment made by the first section of this act [providing for disclosure of public records] are hereby repealed." 1965 House Hearings, pp. 67–68. Congressman Moss stated: "I think it is a very good point" (*id.* at 68). Section 2 was subsequently deleted from the bill reported out by the Subcommittee and was not enacted into law.

gressional recognition that the exemption covers a statute permitting the discretionary disclosure of census information. 13 U.S.C. 8 provides, with respect to information obtained in the census, that the Secretary of Commerce may "in his discretion" furnish "data for genealogical and other proper purposes," as well as transcripts or copies of tables and other census records, but that "[i]n no case shall information furnished * * * be used to the detriment of the persons to whom such information relates." During debates on the FOI bill in the House, Congressman Moss, in response to a question, agreed that exemption 3 covered information obtained by the Bureau of the Census. 112 Cong. Rec. 13646.

Instead of focusing upon the foregoing legislative history of exemption 3, the court of appeals gave primary consideration to a legislative comment about the FOI Act exemptions generally, which noted that the FOI Act sets up workable standards for withholding records in place of the general guidelines contained in Section 3 of the Administrative Procedure Act, the prior law (Pet. App. A, p. 9A). The legislative history of the specific exemption involved, however, must prevail over the history of the exemptions in general. Cf. *Environmental Protection Agency* v. *Mink, supra,* 410 U.S. at 81–82.

In any event there is no inconsistency between, on the one hand, Congress' purpose to replace the general standards of the old Administrative Procedure Act with specific exemptions and, on the other, Congress' manifest intention to preserve all existing nondisclosure statutes intact. While announcing a general

policy of disclosure, Congress also recognized the need for confidentiality in certain areas of government. The FOI Act therefore announces the rule that all "identifiable records" of government must be made public, unless covered by one of the Act's nine exemptions. 5 U.S.C. 552(a)(3) and (b).

Among the Act's specific exemptions is exemption 3, which preserves intact all pre-existing specific nondisclosure statutes. Each nondisclosure statute was enacted by Congress after balancing the need for public access to information against the need for confidentiality with respect to a particular agency. As we have seen, Congress struck the balance differently with respect to different agencies, forbidding any disclosure in some instances and authorizing nondisclosure in others.

In enacting the FOI Act, as a general disclosure statute, Congress deferred to the particularized judgments made with respect to individual agencies by earlier congressional action. Congress provided that disclosure must be made unless there is a specific Act of Congress authorizing nondisclosure. As we now show, Section 1104 is such an Act of Congress.

C. SECTION 1104 OF THE FEDERAL AVIATION ACT IS A STATUTE THAT "SPECIFICALLY EXEMPT[S]" FROM DISCLOSURE THE MATTERS IT COVERS

Section 1104 authorizes the Civil Aeronautics Board or the Federal Aviation Administrator to withhold from disclosure any information obtained by them under the Federal Aviation Act, when they conclude that disclosure would adversely affect the interests of

a person seeking confidential treatment "and is not required in the interest of the public." In this statute Congress has made the judgment that, in cases where the Board or the Administrator decides that the interests of persons seeking confidential treatment and the public interest require that information obtained by them not be made public, the material shall be kept confidential. Section 1104 "specifically exempt[s]" such material from disclosure within the meaning of exemption 3.

Although, as the court of appeals stated, Section 1104 is a congressional delegation of authority to the Board or Administrator to weigh the interest of the objecting party in confidentiality against the public interest in disclosure (Pet. App. A, p. 4A), that fact does not exclude it from the coverage of exemption 3. As we have seen, exemption 3 simply provides that, in order to be exempt under the FOI Act, documents must fall within an exemption of a specific nondisclosure statute; it requires neither that the withholding statute prohibit disclosure nor that it specify which documents are exempt.

Any doubt that Section 1104 is a specific nondisclosure statute preserved by Congress in exemption 3 is dispelled by the fact that Section 1104 was listed in an exhibit submitted during the Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on S. 921 (Freedom of Information and Secrecy in Government) conducted in 1958, 85th Cong., 2d Sess., as one of the "Statutory Provisions Restricting Disclosure of Gov-

ernment Information" (Section 1104 was then 49 U.S.C. 674) (pp. 985–987, 997).[23]

Moreover, during the 1965 House and Senate Hearings, the Civil Aeronautics Board stated its understanding that Section 1104 was encompassed by exemption 3, 1965 House Hearings, p. 237; 1965 Senate Hearings, p. 366. Nowhere in the legislative history is there any challenge to this interpretation.

In addition, a 1960 compilation of nondisclosure statutes, which was referred to in the 1965 House Hearings (p. 20), included a number of discretionary nondisclosure statutes similar to Section 1104. House Committee Print, Federal Statutes on the Availability of Information, 86th Cong., 2d Sess. Although Section 1104 is not specifically mentioned in the 1960 document, because, as its preface states "it does not purport to cover all of the Federal statutes," the 1960 compilation does list nondisclosure provisions which are similar to that section.

For example, the document lists 26 U.S.C. 6104(a)(1)(B), which states that the Secretary of the Treas-

[23] The 1958 Hearings dealt with S. 921, amending 5 U.S.C. 22, and S. 2148, which was one of the first bills to propose a FOI Act and which included the same exemption 3 language contained in the subsequent FOI bills.

The 1958 Hearings also demonstrate congressional awareness of the large number of nondisclosure statutes in existence. In those hearings, reference was made to "around 80 separate statutes providing for limiting information" and to "[t]he fact that Congress has enacted 80 specific statutes authorizing various agencies and departments of the executive branch of the Government to withhold information" (1958 Hearings, pp. 583, 584). The exhibit to the hearings listing the nondisclosure statutes shows that Section 1104 was understood to be one of the 80 "specific statutes" restricting disclosure of government records.

ury or his delegate, shall, upon request of a tax exempt organization, withhold from public inspection any information contained in its application and supporting documents "which he determines relates to any trade secret, patent, process, style of work, or apparatus, of the organization, if he determines that public disclosure of such information would adversely affect the organization." It also lists 15 U.S.C. 78x(b), which provides that any person filing any application, report or other document with the Securities and Exchange Commission may make written objection to the public disclosure of information contained in any such document and that the Commission, after a hearing, is to make the information public only if a disclosure "is in the public interest." [24]

[24] Professor Davis concludes that documents exempted from disclosure by statutes like 15 U.S.C. 78x constitute "matters that are specifically exempted from disclosure by statute" within the meaning of exemption 3. Davis, *Administrative Law Treatise*, § 3A.18 (1970 Supp.).

The court of appeals sought to distinguish Section 78x(b) on the ground that its application was limited by subsection (a) to "trade secrets or processes" (Pet. App. A, p. 8A). That phrase, however, appears only in subsection (a) and has no application to the nondisclosure provision contained in subsection (b). This has been the Securities and Exchange Commission's consistent administrative interpretation. The Securities and Exchange Commission so interpreted 15 U.S.C. 78(x) in 1939 in *American Sumatra Tobacco Corp.*, 7 S.E.C. 1033, affirmed, *American Sumatra Tobacco Corp.* v. *Securities and Exchange Commission*, 110 F. 2d 117 (C.A.D.C.). It recognized that while 15 U.S.C. 78(x)(a) established a "flat prohibition" on the disclosure of trade secrets and processes, 15 U.S.C. 78(x)(b) authorized the Commission to withhold other types of information, if its disclosure was not in the public interest. 7 S.E.C. at 1053. Compare this Court's observation in regarding 15 U.S.C. 79(V) which is substantially similar to 15 U.S.C. 78(X). This Section, it was

Congress intended, in enacting exemption 3, to preserve in tact all pre-existing nondisclosure statutes—including specifically Section 1104. To rule that Section 1104 was implicitly repealed by the FOI Act would thus defeat the congressional policy underlying exemption 3, as well as the policy of confidential treatment reflected in Section 1104 itself.

Moreover, such implied repeal of Section 1104 would severely undercut the Federal Aviation Administration's ability to properly fulfill its investigative duties. Section 1104 provides important assistance to the FAA in promoting aviation safety,[25] as demonstrated by the SWAP program involved in this case. That program is based upon the frank and full voluntary disclosure by an airline of all matters, including problems and defects, to the FAA's expert inspectors so as to prevent or correct unsafe conditions before an accident occurs.

If, however, those statements are to be made public, the airlines have indicated that their concern over the consequences of such disclosure will necessarily adversely affect their voluntary cooperation. Without that cooperation, the SWAP program will be seriously impaired.[26]

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stated, is "plainly intended to safeguard particular information" which, although required to be included in documents filed pursuant to the statute, nevertheless "may be regarded as a private or confidential character and as not directly concerning the public interest," *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U.S. 419, 438. See 17 C.F.R. 240.24b–2.

[25] The FAA has advised that since 1958, it has granted 75 requests for nondisclosure under Section 1104.

[26] The court of appeals in this case was of the view that one of the deficiencies of Section 1104 was that it does not provide

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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for judicial review of a determination of nondisclosure. There is nothing in the language or legislative history of exemption 3, however, that suggests that the lack of judicial review of an administrative determination of confidentiality defeats the exemption of material that is "specifically exempted from disclosure by statute." In any event, an order of nondisclosure by the Administrator or the Civil Aeronautics Board is judicially reviewable under 49 U.S.C. 1486.

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